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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH & WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST, and OPERATING ENGINEERS TRAINING TRUST,
Petitioners,

vs.

INSURANCE COMPANY OF THE WEST,
Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal, Second Appellate District, Division Three, Of The State Of California

PETITION FOR WRIT OF CERTIORARI

WAYNE JETT*
JETT & LAQUER
225 South Lake Avenue
Suite 200
Pasadena, CA 91101
(818) 449-1882
Counsel for Petitioners

* *Counsel of Record*

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

39 pp

QUESTION PRESENTED

Does Section 514(a) of the Employee Retirement Income Security Act of 1974, as amended in 1980 ("ERISA"), preempt an employee benefit plan's state law action filed against an insurance company to enforce private surety bonds issued to assure an employer's payment and performance on construction projects as a means to collect delinquent employer contributions owed to the plan?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Operating Engineers Pension Trust, Operating Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust, and Operating Engineers Training Trust respectfully pray that a Writ of Certiorari issue to review the decision of the Court of Appeal, Second Appellate District, Division Three, of the State of California filed May 25, 1995, in Civil No. B077217 of that Court.

OPINIONS BELOW

The Opinion of the Court of Appeal is officially reported at 35 Cal.App.4th 59, 42 Cal.Rptr.2d 1 and appears in the appendix at pp. la-12a. The Order of the Supreme Court of California filed August 9, 1995, denying petitioners' petition for review is officially reported at ____ Cal.4th ____, and appears in the appendix at p. 13a. The order granting summary judgment in favor of defendant filed June 7, 1993, in the Superior Court of California is not officially reported, and appears in the appendix at pp. 14a-17a.

JURISDICTION

The decision of the Court of Appeal was filed on May 25, 1995. The order of the Supreme Court of California denying discretionary review was filed on August 9, 1995. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTION AND STATUTES INVOLVED

The Supremacy Clause of the Constitution; Section 514(a) and (c) of ERISA, 29 U.S.C. § 1144(a), (c), 88 Stat. 897; Section 515 of ERISA, 29 U.S.C. § 1145, 94 Stat. 1295; and California Civil Code § 1559 are set forth in the appendix at pp. 18a-19a.

STATEMENT OF THE CASE

Petitioners Operating Engineers Pension Trust, *et al.* (the "Trusts"), are multiemployer employee benefit plans which receive employer contributions as provided by collective bargaining agreements in the construction industry of California and Nevada. A general contractor, William Kirchnavy Construction, Inc. ("Kirchnavy"), failed to pay contributions to the Trusts on behalf of its employees on certain construction projects. When the Trusts found

Kirchnavy unable to pay the obligated contributions, the Trusts filed an action in the Superior Court of Los Angeles County seeking to enforce claims against certain surety bonds issued by respondent Insurance Company of the West ("ICW") on behalf of Kirchnavy, as principal, on six construction projects in California.

The Superior Court granted summary judgment in favor of ICW against the Trusts on grounds that state law claims by the Trusts as third party beneficiaries of the surety bonds are preempted by Section 514(a) of ERISA. The Court of Appeal affirmed on grounds that the Trusts' third party beneficiary claims are preempted by Section 514(a) because such claims brought under Civil Code § 1559 would supplement the remedy provided by ERISA. The Court of Appeal ruled that the remedy afforded by § 515 of ERISA against the delinquent employer was intended by Congress to be exclusive and the only means available to employee benefit plans to collect delinquent contributions, citing *Carpenters Health & Welfare Trust Fund v. Tri Capital Corporation*, 25 F.3d 849 (9th Cir. 1994) *cert. denied* ____ U.S. ____, 115 S.Ct. 580, and *Carpenters So. California Administrative Corp. v. El Capitan Development Co.* (1991) 53 Cal.3d 1041, 282 Cal.Rptr. 277 *cert. denied* ____ U.S. ____, 112 S.Ct. 430. The Supreme Court of California denied a petition for review, with Justice Mosk voting to grant review.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION PRESENTS THIS COURT THE OPPORTUNITY TO CONSIDER, FOR THE FIRST TIME, THE PREEMPTIVE INTENT OF ERISA WITH RESPECT TO STATE LAW CLAIMS BY EMPLOYEE BENEFIT PLANS TO RECOVER DELINQUENT EMPLOYER CONTRIBUTIONS FROM THIRD PARTIES OTHER THAN EMPLOYERS.

This Court has repeatedly reviewed and announced interpretive rulings of the scope of ERISA preemption of state law claims *against* employee benefit plans by plan participants, beneficiaries and various third parties. See, *e.g.*, *Pilot Life Insurance Company v. Dedeaux* (1987) 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 [state law claims by beneficiary against employee benefit plan for mishandling benefits]; and, *Mackey v. Lanier Collection Agency* (1988) 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 [third party levy of execution against assets of employee benefit plan to satisfy judgment owed by plan participant]. However, despite the multitude of ERISA preemption cases dealing with claims *against* employee benefit plans and relating to the administration of such plans, this Court has not reviewed and decided a single case illuminating the effect of ERISA's preemption clause on state law claims filed *by* employee benefit plans *against other parties* seeking to recover employer contributions or other amounts owed to the plans.

This Court's explication of ERISA's preemptive effect on state law claims brought by employee benefit plans against parties other than employers, particularly such claims seeking to collect delinquent employer contributions, is urgently needed. ERISA was amended in 1980 to add a federal statutory cause of action by employee benefit plans to recover delinquent contributions and other amounts from

the delinquent employer. The preemptive effect of ERISA on state law with respect to such federal actions against delinquent employers is properly determined by reviewing congressional intent in 1980 when that federal cause of action against the employer was enacted. Nevertheless, absent a decision by this Court construing the 1980 preemptive intent, many lower courts have sought guidance on this distinctive issue from the decisions of this Court interpreting the preemptive intent of the 1974 enactment. Consequently, many lower court decisions addressing this subject are confused, misguided and erroneous with respect to the relevant congressional intent. Indeed, the decisions of the lower courts are in conflict and, specifically, the line of cases leading to the decision of the Court of Appeal below is erroneous. Accordingly, this Court's review and guidance is needed at the earliest possible date to curtail monetary losses presently being experienced by employee benefit plans in the range of millions of dollars annually.

II.

THE DECISIONS OF THE STATE AND FEDERAL COURTS ARE IN CONFLICT ON THIS IMPORTANT FEDERAL QUESTION.

The highest court of the State of New York first addressed the contention that a state law which aids an employee benefit plan in the collection of delinquent employer contributions is preempted by § 514(a) of ERISA. In *Sasso v. Vachris* (N.Y. 1985) 66 N.Y.2d 28, 484 N.E.2d 1359, the New York Court considered whether an employee benefit plan governed by ERISA could rely upon a state statute in imposing personal liability on shareholders of corporate employers which failed to pay contributions owed to the plan. Guided by this Court's rulings that state law is presumed not to have been preempted by federal statute in the absence of persuasive evidence to the contrary, and

acknowledging that the "task in deciding this preemption question is to ascertain and give effect to the congressional intent embodied in the Federal Statute at issue . . . ," 484 N.E.2d at 1362, the New York court properly concluded without hesitation that the state statute in question was *not* preempted by ERISA. In part, the New York court reasoned that the state statute imposing joint and several liability on defendants regulates the employer only, and does not attempt to regulate the content of the employee benefit plan. *Id.*, 484 N.E.2d at 1363. *Cf.*, ERISA § 514(c)(2). More importantly, the New York court discerned congressional intent by analyzing the legislative history of the 1980 amendments to ERISA, which added specific provisions dealing with delinquent contributions. First, the court recognized that ERISA as originally enacted in 1974 contained no provision dealing with employer delinquent contributions, but created causes of action by fiduciaries only for equitable relief to enforce the statute or the terms of the employee benefit plan. *Ibid.* Second, the court noted that the 1980 amendments to ERISA indicate no intent on the part of Congress to preempt existing state remedies. *Ibid.* Finally, the New York court ruled as follows:

> "[T]he relevant legislative history of these [1980] amendments evince a specific congressional intent that ERISA's civil remedies merely supplement, rather than supercede, existing State remedies . . . , at least insofar as they provide for the collection of delinquent employer contributions to employee benefit plans (citations omitted.)" *Id.* 484 N.E.2d at 1364.

At this point in the opinion, *Sasso* notes and quotes from the legislative history of the 1980 amendments to ERISA, lending its own emphasis to the statement, as follows:

> "*The [legislation] does not change any other type of remedy permitted under State or Federal law with*

respect to delinquent multiemplover plan contributions." Citing 126 Cong.Rec. at 20202. *Ibid.*

Other more recent state court decisions have similarly concluded that state law remedies are available to employee benefit plans to collect delinquent employer contributions from third parties. *Plumbers Local 458 v. Howard Immel, Inc.* (Wis.App. 1989) 151 Wis.2d 233, 445 N.W.2d 43 [employee benefit plan action to collect delinquent employer contributions through state law action to enforce construction lien law is *not preempted* by ERISA]; *Seaboard Surety Company v. Indiana State District Council of Laborers and Hod Carriers Health and Welfare Fund* (Ind.App. 1995) ____ Ind.2d ____, 645 N.E.2d 1121 [employee benefit plan action to recover delinquent employer contributions through state law action to enforce surety bonds issued on construction project is *not preempted* by ERISA, noting that the U. S. Supreme Court "has never held that a state law providing a plan with supplemental remedies was preempted by ERISA"].

Likewise, the U. S. Court of Appeals for the Third Circuit recently ruled that ERISA does not preempt a state law claim by employee benefit plans to collect delinquent employer contributions against surety bonds issued to assure payment of labor and materials on construction projects. *Ragan v. Tri-County Excavating, Inc.* (3rd Cir. 1995) ____ F.3d ____, ____ [action by employee benefit plans as common law third party beneficiaries of surety bonds does not "relate to" the plans, nor is a surety an "employer" against whom ERISA's remedy is intended to be exclusive].

By contrast, the decision of the California Court of Appeal below holds that the Trusts' state law claims as third party beneficiaries of private surety bonds are preempted by ERISA because ERISA's cause of action against the employer is intended to be the sole and exclusive remedy of employee benefit plans to collect such delinquent amounts.

The Court of Appeal was controlled by *Carpenters v. El Capitan Development Co.* (1991) 53 Cal.3d 1041, 1054, 282 Cal.Rptr. 277, 284, *cert. den.* ____ U.S. ____, 112 S.Ct. 430, which declared void a state mechanic's lien statute [state laws "may not be used to supplement or supplant the civil enforcement scheme developed by ERISA"]. In so ruling, the California Supreme Court relied almost solely upon decisions of this Court interpreting the preemptive intent of Congress in 1974 when ERISA was made the exclusive body of law regulating the administration of employee benefit plans. The California court implicitly ruled (erroneously) in *El Capitan* that ERISA as enacted in 1974 contained a federal cause of action for delinquent employer contributions and, further:

> "With the addition of § 515 of ERISA (29 U.S.C. § 1145) in 1980, Congress sought only to streamline the process of collecting delinquent contributions exclusively under federal law." *Id.*, 53 Cal.3d at 1053, 282 Cal.Rptr. at 283, note 8.

Finally, the California Supreme Court dismissed the 1980 legislative history of § 515 of ERISA relied upon in *Sasso v. Vachris* as unpersuasive and, on that basis, declined to "vitiate the extensive legislative history of ERISA and the numerous United States Supreme Court statements regarding Congress, choice of certain enforcement provisions and the exclusion of all others." 53 Cal.3d at 1053, 282 Cal.Rptr. at 284, note 9.

Some courts have held certain state laws to be preempted by ERISA under the rule that "any state law which singles out ERISA plans, by express reference, for special treatment is preempted," even though that rule, as with all other pronouncements by this Court on ERISA preemption, was announced in *Mackey v. Lanier Collection Agency, supra*, a case arising under the 1974 federal statute involving state law claims against an employee benefit plan, rather than

state law claims by employee benefit plans against employers or third parties after the 1980 amendments to ERISA. In *Sturgis v. Herman Miller, Inc.* (9th Cir. 1991) 943 F.2d 1127, the Ninth Circuit considered the same state mechanic's lien statute as was involved in *El Capitan* and held the statute to be preempted under the rule of *Mackey* quoted above. Similar results were reached in *Chesnut-Adams Ltd. Partnership v. Bricklayers & Masons Trust Funds of Boston* (Mass. 1993) 415 Mass. 87, 612 N.E. 2d 236; *McCoy v. Massachusetts Institute of Technology* (1st Cir. 1991) 950 F.2d 13, *cert. denied* ____ U.S. ____, 112 S.Ct. 1939, 118 L.Ed. 2d 545; and *Bricklayers Local 33 Benefit Funds v. America's Marble Source, Inc.* (3d Cir. 1991) 950 F.2d 114. See, also, *Williams v. Ashland Engineering Co., Inc.* (1st Cir. 1995) 45 F.3d 588, 591 [state statute requiring surety bond on public works projects to cover employer contributions to employee benefit plans *held* preempted, and plans' state law action to enforce bond fails].

Other courts, including the Court of Appeal below, have swung the ERISA preemption scythe in a much wider arc, cutting down generic statutes written to aid all persons; the preemptive effect occurs whenever an employee benefit plan seeks to rely upon any state law as a basis for recovering delinquent employer contributions from any party. In *Ironworkers Midsouth Pension Fund v. Terotechnology Corp.* (5th Cir. 1990) 891 F.2d 548, *rehearing denied*, 896 F.2d 549 (en banc) *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3272, 111 L.Ed.2d 782, the Fifth Circuit nullified a mechanic's lien statute which enabled employee benefit plans to collect delinquent contributions as an impermissible attempt "to supplement the exclusive civil remedies provided by ERISA." *Id.* at 555. More recently, the Ninth Circuit adopted the "exclusive remedy" reasoning of *El Capitan* and *Terotechnology* to nullify the use by employee benefit plans of California Civil Code 1559, a completely generic third party

beneficiary statute enacted in 1872. *Carpenters Health & Welfare Trust Fund v. Tri Capital Corp.* (9th Cir. 1994) 25 F.3d 849 *cert. denied* ____ U.S. ____, 115 S.Ct. 580 [defendant contractor "is analogous to . . . surety" rather than employer, so cannot be sued in ERISA action, but cannot be sued as surety because state statute authorizing actions by third party beneficiaries cannot supplement the ERISA remedy against the delinquent employer only].

In summary, the decisions of the courts of New York, Indiana, Wisconsin and the Third Circuit are in conflict with the California court below, the Massachusetts court, and the First, Fifth and Ninth Circuits.

III.

ASCERTAINING THE SPECIFIC INTENT OF CONGRESS IN 1980 IS THE TOUCHSTONE FOR DEFINING THE PREEMPTIVE SCOPE OF ERISA WITH RESPECT TO STATE LAW REMEDIES AVAILABLE FOR COLLECTING AMOUNTS OWED TO EMPLOYEE BENEFIT PLANS FROM THIRD PARTIES OTHER THAN EMPLOYERS.

Since the 1974 ERISA legislation did not deal with employer delinquencies, the preemptive intent of Congress in 1974 has little or no relevance to the issue presented in this petition. Indeed, the use of this Court's decisions on preemption issues arising under the 1974 enactment has been largely counterproductive in the lower courts when the critical question is actually the preemptive intent of the 1980 amendments to ERISA.

> "In deciding whether a federal law preempts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue." *Metropolitan Life*

Ins. Co. v. Massachusetts (1985) 471 U.S. 724, 738, 105 S.Ct. 2380, 2388, 85 L.Ed.2d 728.

The threshold error made by some courts has been to assume that "the federal statute at issue" is ERISA as enacted in 1974, which included the preemption clause of § 514(a).

The essential point to be recognized is that neither ERISA nor § 514(a) would raise a preemption issue in this case if § 515 of ERISA had not been added by the amendments of 1980. Thus, "the federal statute at issue" must first be identified as § 515, enacted in 1980, which was Congress' first effort to deal with the problems of collecting employer delinquent contributions through ERISA.

No decision of this Court has yet covered this vital ground, and the present disarray in the treatment of employer benefit plans in the lower courts is the undeniable consequence. For example, in California, employee benefit plans are no longer permitted to collect delinquent amounts by enforcing mechanic's liens against private property, stop notices against public projects, contractor license bonds and contractor payment and performance surety bonds. Meanwhile, in New York, Indiana, Wisconsin and the Third Circuit, employee benefit plans suffer no such losses and continue enforcing long standing rights under state law with no conflicting effects under the federal statutory scheme.

IV.

THE TIME IS RIPE FOR THIS COURT TO DETERMINE WHETHER EMPLOYEE BENEFIT PLANS MAY USE STATE LAW TO COLLECT DELINQUENT AMOUNTS OWED TO THE PLANS FROM THIRD PARTIES.

Whether the existing status of sharply conflicting decisions among the courts is viewed as a helpful winnowing of

arguments and reasoning, or as a disruptive and destructive evisceration of important economic rights of workers, the fact is that fifteen years have passed since the 1980 amendments added § 515 to ERISA. Indeed, ten years have passed since the publication of the well reasoned analysis of this important issue by the Court of Appeals of New York in *Sasso v. Vachris, supra.* During that time, this Court has reviewed and decided numerous cases involving the preemptive intent of ERISA with respect to state laws affecting claims against employee benefit plans. But still to this date, the Court has accepted review of no case involving ERISA's preemptive intent with respect to state law remedies available to employee benefit plans as they seek to perform their fiduciary duties to recover monies owed to the plans from third parties other than employers.

In the absence of direct guidance by this Court, the misuse of reasoning developed under the 1974 enactment of ERISA has led to the court decision below invalidating a generic third party beneficiary state statute. By that decision, an employee benefit plan cannot sue to enforce a private surety bond issued by an insurance company to assure payment of the employer's obligations.

Such a result, by all appearances, seems squarely at odds with the expressed intent of Congress in 1980, which was to make collection of delinquent employer contributions more efficacious, 126 Cong.Rec. S11673, without changing any other type of remedy permitted under state or federal law with respect to delinquent multiemployer contributions. 126 Cong.Rec. at 20202. The legislative history of ERISA contains no evidence of an intent by Congress to grant employee benefit plans a federal cause of action against the employer under ERISA in exchange for nullification of all state law rights and remedies against the employer and all third parties.

While this question of preemptive intent remains undecided by this Court, employee benefit plans in California and other states are incurring substantial monetary losses through nullification of rights and remedies previously enjoyed under state law, and still enjoyed under state law in New York, Indiana, Wisconsin and now, thanks to the Third Circuit, in Pennsylvania.

CONCLUSION

Based on the foregoing, the petition should be granted.

DATED: September 29, 1995

Respectfully submitted,

WAYNE JETT*
JETT & LAQUER
225 South Lake Avenue
Suite 200
Pasadena, California 91101
(818) 449-1882

Counsel for Petitioners

* Counsel of Record